



September 21, 2001

Mr. Craig H. Smith
Deputy General Counsel
Texas Workers' Compensation Commission
Southfield Building, MS-4D
4000 South IH-35
Austin, Texas 78704-7491

OR2001-4247

Dear Mr. Smith:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 152246.

The Texas Workers' Compensation Commission (the "commission") received a request for a copy of the proposal submitted to the commission by Ingenix, Inc., ("Ingenix"), in response to a request for Qualifications for Hospital & Ambulatory Surgical Center Fee Guideline Development. As required under section 552.305 of the Government Code, you notified Ingenix of the request for their information and invited it to submit arguments to this office as to why the information at issue should not be released.¹ A representative of Ingenix timely responded to your notice. Ingenix contends that a portion of its responses dated March 14, 2001, April 20, 2001 and June 5, 2001 is excepted from required public disclosure pursuant to section 552.110 of the Government Code. We have considered the arguments of Ingenix and have reviewed the submitted information.²

¹See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances)

²We note that the commission submitted as responsive to the request Attachment C, the response of Ingenix to the commission dated April 20, 2001; Attachment D, a follow-up dated May 21, 2001; and Attachment E, a document entitled "Ingenix Solutions Presented to: (the commission)". In addition to making arguments for withholding information contained within these attachments, Ingenix also made arguments for withholding "Exhibit 1: Proposed Maximum Fee Schedule by DRG," as well as the "information following the three introductory paragraphs on what is labeled page 3 (sic) in the Follow-up to Cost Proposal dated May 29, 2001." Although Ingenix submitted this information to our office, the commission did not. Therefore, this ruling does not address this information, and is limited to the information submitted as responsive by the

Section 552.110 protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a), (b). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).³ This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). The commercial or financial branch of section 552.110 requires the business enterprise whose information is at issue to make a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. *See* Open Records Decision No. 661 (1999).

Upon review of the arguments submitted by Ingenix, we find that the following information contained in the submitted Attachment C, dated April 20, 2001, is excepted under the trade secret branch of section 552.110(a): section 2.2.9: Project Work Plan; section 2.2.9.3: explanation of research; those paragraphs of section 2.2.9.4 labeled "Outpatient Data" and "Inpatient Data"; and Exhibit C: Samples of Prior Work. We also find that the slides contained in Attachment E identified by Ingenix as 12, 13 and 14, Timeline, and 17, 18, 19 and 20, Sample of Prior Work, are excepted as trade secrets under section 552.110(a). We have marked the information to be withheld in Attachment E.

commission. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting a decision from Attorney General must submit a copy of the specific information requested, or representative sample if voluminous amount of information was requested).

³The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

We find that Ingenix has established that release of those items within section 2.3, contained in Attachment C, that state the actual number of people assigned to previous projects and the cost or value of those projects would result in substantial competitive harm, and therefore this information is excepted from disclosure under section 552.110(b).

With regard to section 2.2.10, Cost Proposal, we do not believe that pricing information is excepted from disclosure. *See* Open Records Decision No. 509 at 5 (1988) (stating that because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative); *see also* Gov't Code § 552.022(a)(3) (information in an account, voucher, or contract relating to the receipt or expenditure of public funds by a governmental body is public information); Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors). Therefore, section 2.2.10, Cost Proposal, must be released to the requestor.

To summarize, the following information contained in the submitted Attachment C, dated April 20, 2001, is excepted under the trade secret branch of section 552.110(a): section 2.2.9: Project Work Plan; section 2.2.9.3: explanation of research; those paragraphs of section 2.2.9.4 labeled "Outpatient Data" and "Inpatient Data"; and Exhibit C: Samples of Prior Work. We also find that the slides contained in Attachment E identified by Ingenix as 12, 13 and 14, Timeline, and 17, 18, 19 and 20, Sample of Prior Work, are excepted as trade secrets under section 552.110(a). Those items within section 2.3 that state the actual number of people assigned to previous projects and the cost or value of those projects, also within submitted Attachment C, must be withheld under section 552.110(b). The remaining responsive information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the

statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/seg

Ref.: ID# 152246

Enc.: Submitted documents

c: Mr. Jerome F. White, President
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